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Dylan McCloskey  
*Saint Louis University School of Law*

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## Democracy Under Attack: Iowa's 'Bloody Second'

Dylan McCloskey\*

In November 2020, Representative Mariannette Miller-Meeks made history as the first woman elected to represent Iowa's Second Congressional District.<sup>1</sup> The margin was slim, but after recounts Miller-Meeks won the race by six votes.<sup>2</sup> However, even after the election was certified by a bipartisan state election board, Speaker Nancy Pelosi refused to permanently seat Rep. Miller-Meeks because her opponent, Rita Hart, brought a challenge under the Federal Contested Elections Act.<sup>3</sup> This prompted the House Administration Committee to begin hearing the challenge in February, which may end with the removal of a duly elected Representative.<sup>4</sup> Although, if removed, this will not be the first time the House of Representatives used this challenge process to deny a seat to an elected member of Congress.<sup>5</sup> This article will address how a contested election challenge works, whether Hart's claims warrant congressional review, and the lasting impacts this challenge may have on our democratic institutions.

The Constitution grants Congress the power to "Judge the Elections, Returns and Qualifications of its own members."<sup>6</sup> The Supreme Court has interpreted this section of the Constitution to allow the House and Senate to make an independent, final judgement because this is a political power reserved to the Legislative branch.<sup>7</sup> This power allows Congress to act as a

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\* J.D. Candidate, 2022, Saint Louis University School of Law

<sup>1</sup> Tom Barton, *Miller-Meeks joins record number of GOP women in Congress with swearing in Sunday*, QUAD-CITY TIMES (Jan. 3, 2021), [https://qctimes.com/news/local/miller-meeks-joins-record-number-of-gop-women-in-congress-with-swearing-in-sunday/article\\_114cbba4-6fe8-5601-b920-3409d70139b0.html](https://qctimes.com/news/local/miller-meeks-joins-record-number-of-gop-women-in-congress-with-swearing-in-sunday/article_114cbba4-6fe8-5601-b920-3409d70139b0.html).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> Ally Mutnick, *House takes first steps toward deciding contested Iowa election*, POLITICO (Feb. 19, 2021, 4:30 AM), <https://www.politico.com/news/2021/02/19/house-iowa-election-miller-meeks-470062>.

<sup>5</sup> *Id.*

<sup>6</sup> U.S. CONST. art. 1, § 5, cl. 1.

<sup>7</sup> *Barry v. United States*, 279 U.S. 597, 613, 49 S. Ct. 452, 455 (1929) ("[Congress] has had conferred upon it by the Constitution certain powers which are not legislative but

judicial tribunal with power to compel witness, issue warrants, and render a final judgement that is beyond any other court's ability to review.<sup>8</sup> The Federal Contested Elections Act ("FECA") of 1969 was enacted by Congress to create a set of procedures for a losing candidate to file a challenge.<sup>9</sup> The House Administration Committee is the body that conducts such a hearing; however, the committee typically creates a smaller task force with only a handful of committee members.<sup>10</sup> Once the House Administration Committee or its task force conducts an investigation, the panel will make a recommendation to the full house and a simple majority will determine the winner of the election.<sup>11</sup> However, history suggests this review process is more partisan than it is fair.

The last contested election decided by the House of Representatives was the race in Indiana's Eighth Congressional District in 1984.<sup>12</sup> The dispute earned the name the "Bloody Eighth" because of the partisan vitriol that divided the House of Representatives and the congressional district as the dispute lingered.<sup>13</sup> The challenge ended when Democrats overturned the certified election of the Republican, Richard McIntyre, in favor of their incumbent

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judicial in character. Among these is the power to judge of the elections, returns and qualifications of its own members."); see *Powell v. McCormack*, 395 U.S. 486 (1969).

<sup>8</sup> *Barry*, 279 U.S. at 613 ("Exercise of the power necessarily involves the ascertainment of facts, the attendance of witnesses, the examination of such witnesses, with the power to compel them to answer pertinent questions, to determine the facts and apply the appropriate rules of law, and, finally, to render a judgment which is beyond the authority of any other tribunal to review.").

<sup>9</sup> 2 U.S.C. §§ 381-396.

<sup>10</sup> Mutnick, *supra* note 4.

<sup>11</sup> Brianne Pfannenstiel, *U.S. Rep. Mariannette Miller-Meeks asks Congress to throw out petition from Rita Hart challenging her six-vote win in Iowa's 2<sup>nd</sup> District*, DES MOINES REG. (Jan 21, 2021, 12:00 AM),

<https://www.desmoinesregister.com/story/news/politics/2021/01/21/mariannette-miller-meeks-asks-congress-dismiss-rita-hart-election-challenge/4232552001/>.

<sup>12</sup> Salena Zito, *In tight Iowa congressional race, echoes of 1984's 'Bloody Eighth'*, WASH. EXAMINER, (Dec. 4, 2020, 4:37 PM), <https://www.washingtonexaminer.com/opinion/in-tight-iowa-congressional-race-echoes-of-1984s-bloody-eighth>.

<sup>13</sup> James Risen, *Reagan to Join Bloody House Battle: Indiana District Race, Won by 4 Votes in '84, Turns Into Rematch*, L. A. TIMES, (Oct. 29, 1986 12:00 AM), <https://www.latimes.com/archives/la-xpm-1986-10-29-mn-8026-story.html>.

colleague, Frank McCloskey.<sup>14</sup> Democrats accomplished this election win by using their majority to establish a task force comprising of two Democrats and one Republican.<sup>15</sup> The majority created new rules disposing of Indiana election law by counting non-notarized ballots and the task force voted along party lines for nearly every decision.<sup>16</sup> When the Democrat candidate pulled ahead, the counting stopped and the rules changed.<sup>17</sup> Later a local newspaper would audit the remaining ballots that met the original rules of the committee and find that McIntyre had more votes, once again.<sup>18</sup> It was an embarrassment to the greatest democracy in the world and one that could be repeated by any simple majority in the House of Representatives. Further, previous instances already showed extreme partisanship in these decisions because this power more frequently deprives minority-party seat holders than majority-party seat holders.<sup>19</sup>

History serves as a cautionary tale that the House of Representatives should be reserved as a last resort for interfering in congressional elections. In fact, a previous House of Representatives created precedent that requires a losing candidate should seek all available relief in State courts before, or concurrent with, filing a challenge with the House Administration Committee.<sup>20</sup> However, Rita Hart refused to bring her case before a five-judge panel, which included the Chief Justice of the Iowa Supreme Court,

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<sup>14</sup> Robert L. Jackson & Zack Nauth, *Republicans Stalk Out, Buycott Swearing In*, L.A. TIMES (May 2, 1985, 12:00 AM), <https://www.latimes.com/archives/la-xpm-1985-05-02-mn-20101-story.html>.

<sup>15</sup> Dale Russakoff, *House Recount Fight Is on Familiar Battlefield*, WASH. POST, (Apr. 24, 1985) <https://www.washingtonpost.com/archive/politics/1985/04/24/house-recount-fight-is-on-familiar-battlefield/4d3d9567-9398-4488-9abb-ad9e2c683684/>

<sup>16</sup> Roberta Herzberg, *McCloskey versus McIntyre: Implications of Contested Elections in a Federal Democracy*, 16 PUBLIUS: J. FEDERALISM 93, 101-02 (1986).

<sup>17</sup> Herzberg, *supra* note 16, at 106.

<sup>18</sup> Herzberg, *supra* note 16, at 106; See also Edward Walsh, *Eight Indicted in Indiana On Charges of Buying Votes*, WASH. POST (June 28, 1986), <https://www.washingtonpost.com/archive/politics/1986/06/28/eight-indicted-in-indiana-on-charges-of-buying-votes/a2ddae4e-9bc6-4d02-a3fd-7ca650670d9e/> (finding in addition to receiving fewer votes, McCloskey had received votes from a vote-buying scheme).

<sup>19</sup> C. H. Rammelkamp, *Contested Congressional Elections*, 20 POL. SCI. Q. 421, 432 (1905) (“In the period of thirty-nine years covered by the statistics just given, the majority deprived itself of seats only nine times, while it deprived the minority of seats eighty-two times.”).

<sup>20</sup> *Swanson v. Harrington*, H.R. REP. NO. 76-1722, at 2 (1940) (finding the challenging candidate should have “establish[ed] that the door was closed to relief” in state courts).

as Iowa election law permitted.<sup>21</sup> Iowa judges, who are selected by the nonpartisan Missouri Plan,<sup>22</sup> are best suited to decide Iowa election law. Moreover, any decision Iowa courts made could better serve Congress (an institution that comprises of an increasing majority of non-lawyers) in determining how to interpret Iowa law to settle the results of the election. At the very least, an Iowa decision could have served as a deterrent for unconcealed partisanship. Hart claims she had inadequate time, but her complaints were known well before November 30, giving Hart sufficient time to file under Iowa procedures.<sup>23</sup> Instead, Rita Hart “forum shopped” for an outcome-driven partisan group of people, uninterested in the actual votes of Iowans. Article I gives Congress the power to judge contested elections, but failing to seek relief in state courts should be a reason Congress dismisses Hart’s claim.

Further, the merits of Hart’s claims warrant dismissal. On their face, the complaints from the Hart campaign are compelling. She argues that there was disparate treatment across county lines with respect to recounting votes, and that votes were suppressed because a couple dozen votes remain uncounted due to identifying mark issues or problems with envelope seals.<sup>24</sup> The problem is that the Hart campaign requested, and was granted, disparate treatment by advocating for hand recounts in predominately Democrat counties and machine recounts in predominately Republican counties.<sup>25</sup> Her notice of contest specifically cites the counties where she requested machine recounts as a reason for congressional review because her request potentially affected the outcome of the election.<sup>26</sup> This argument

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<sup>21</sup> Iowa Code § 60.1 (2021).

<sup>22</sup> James A. Gleason, *State judicial selection methods as public policy: The Missouri plan 14* (2016) (unpublished PhD thesis, Purdue University) (on file with the Purdue University Library).

<sup>23</sup> Derek Muller, *Iowa’s Second Congressional District Contest Should Be Dismissed for Lack of Exhaustion of State Remedies*, ELECTION L. BLOG (Dec. 22, 2020, 11:32 AM), <https://electionlawblog.org/?p=119861>; IOWA CODE § 57.1(2).

<sup>24</sup> Hart Notice of Contest, *Hart v. Miller-Meeks* (filed Dec. 22, 2020), *available at* <https://www.democracymocket.com/wp-content/uploads/sites/45/2020/12/IA-02-Notice-of-Contest-and-Appendix-Stamped-Copy.pdf>.

<sup>25</sup> *Pelosi Keeps Her Gunpowder Dry*, WALL ST. J. (Jan. 4, 2021, 6:26 PM), <https://www.wsj.com/articles/pelosi-keeps-her-gunpowder-dry-11609802806?redirect=amp#click=https://t.co/2Cpj5miJQB>.

<sup>26</sup> Hart Notice of Contest, at 43-44, *Hart v. Miller-Meeks* (filed Dec. 22, 2020) (arguing in paragraphs 154 and 156 that machine recounts, which she requested, did not allow for

should be dismissed due to estoppel, which prevents a party from raising an argument at one stage of the process and changing course to raise a contrary argument at a later stage.<sup>27</sup> Hart's second claim is that twenty-two votes were suppressed for various non-legitimate reasons and that all votes must be counted. However, this claim comes after the Hart campaign successfully excluded numerous ballots cast for Miller-Meeks over identifying mark issues.<sup>28</sup> Therefore, it is difficult to take her claims of "voter suppression" or injustice seriously when she herself is actively attempting to exclude ballots. Moreover, this undermines her claims that the excluded ballots would give her the win. Hart's claims are making a mockery of our democratic process and deserve to be dismissed by Congress.

In the coming weeks, the House Administration Committee or its task force will hear this evidence and make decisions on a handful of American votes. This decision to move forward will have unintended consequences that future losing candidates will request inconsistent treatment across counties to preserve a claim that inconsistent treatment occurred and that candidates will skip a legal process, in favor of a biased political one. Since the House is determined to pursue this action despite the cost, the rules they make will be crucial in protecting the legitimacy of majority rule in the United States. Importantly, the House must act with consistency and with deference to Iowa laws. Otherwise, Congress runs the risk of legitimately creating lost confidence in our political system. This is a daunting task that this Congress is not prepared to meet, so it is likely to end in the further erosion of American democracy.

Edited by Ben Davisson

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county officials to examine ballots for identifying mark issues and this gave Miller-Meeks an advantage).

<sup>27</sup> Muller, *supra* note 23.

<sup>28</sup> Pelosi Keeps Her Gunpowder Dry, *supra* note 25.